Office-Supreme Court, U.S.
FILED
AUG 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, SUPERINTENDENT
CHILLICOTHE CORRECTIONAL INSTITUTE

Petitioner,

vs.

LINCOLN ISAAC,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT LINCOLN ISAAC

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QUESTIONS PRESENTED

Question I:

DOES THE *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977), CAUSE/PREJUDICE REQUIREMENT BAR FEDERAL HABEAS CORPUS REVIEW OF THE DENIAL OF A NEW TRIAL BASED UPON A RETROACTIVE CHANGE IN THE LAW WHEN THE DEFENDANT FAILS TO OBJECT AT TRIAL?

Question II:

ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE OF CRIMINAL LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASED UPON A STATE PROCEDURAL RULE?

Question III:

ONCE THE HIGHEST COURT OF THE STATE, IN ITS SYLLABUS, DECLARES A CHANGE OF LAW TO BE RETROACTIVE, CAN IT SELECTIVELY ENFORCE A PROCEDURAL "CONTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN A DEFENDANT'S TRIAL RECORD DEMONSTRATES A CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

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STATEMENT OF CASE

On April 9, 1975, Lincoln Isaac went unannounced to a bar at 2 a.m. to attempt to pick up Donna Shobe, his ex-wife and the barmaid, to take her to his home as he had done many times in the past.

Upon his arrival, he was met by Bernard Engle, her boyfriend, who was also there to pick her up. Isaac claimed Engle, without provocation, "sucker punched" him first from behind and he acted in self-defense. Engle suffered severe injuries. The only witnesses to the first punch were Isaac and Engle. Mrs. Shobe admitted, upon cross-examination, that she did not see the beginning of the fight (trial transcript at page 44.)

Isaac, on May 30, 1975, was indicted for the offense of Felonious Assault, in that he "unlawfully did knowingly cause serious physical harm to Bernard Engle contrary to and in violation of Section 2903.11 of the Ohio Revised Code . . .".

At trial, on September 16, 1975, Isaac relied solely on the affirmative defense on self-defense. Trial counsel indicated this on opening statement and it was argued in closing argument. The trial court instructed the jury that the defendant had to prove self-defense by a preponderance of the evidence. Isaac did not object to this portion of the jury charge.

The defendant was convicted of the lesser included offense of Aggravated Assault. He was sentenced on September 16, 1975, to the Ohio Penitentiary for a term of six months to five years. Isaac timely appealed to the Court of Appeals for Pickaway County, Fourth Appellate District. While his appeal was pending, the Supreme Court of Ohio, on July 21, 1976, decided the case of *State v. Robinson*, 47 Ohio St. 2d 103 (1976), which case clearly stated that the traditional defense of self-defense no longer placed the burden of proof upon the defendant, but placed the burden on the State of Ohio to disprove the defense, once the defendant raised it.

Defendant immediately briefed to the Fourth District Court of Appeals the case of *Robinson, supra,* claiming this case entitled him to a new trial since the jury had been improperly instructed.

The Court of Appeals affirmed the trial court stating Ohio Criminal Rule 30 barred relief because counsel did not timely object to the jury charge.

Issac timely appealed to the Supreme Court of Ohio alleging: (1) that *Robinson* should be applied retroactively, (2) that his failure to object constitute plain error under Ohio Criminal Rule 52, (3) that *O'Connor v. Ohio,* 385 U.S. 92 (1966), held Criminal Rule 30 could not bar review of a federal constitutional right, and (4) that *Mullaney v. Wilbur,* 421 U.S. 684 (1975), required a new trial on federal due process grounds.

On July 20, 1977, the Supreme Court of Ohio dismissed Isaac's appeal for a lack of substantial constitutional question, and on the same day decided the cases of *State v. Humphries* and *State v. Myer,* 51 Ohio St. 2d 95 (1977), which held *Robinson* was to be treated retroactively to January 1, 1974. The Supreme Court of Ohio denied Humphries a new trial because he failed to object at his jury trial to the charge, but granted a new trial to Myer because she was tried solely to the court.

On May 3, 1978, Isaac filed a petition for writ of habeas corpus in the U.S. District Court for the Southern District of Ohio, Eastern Division, alleging he was entitled to relief base upon *Robinson, Humphries, Mullaney,* and *Hankerson v. North Carolina,* 432 U.S. 233. The writ was denied based upon *Wainwright v. Sykes,* 433 U.S. 72, due to counsel's failure to object.

Isaac timely appealed to the U.S. Court of Appeals for the Sixth Circuit, which granted the writ of habeas corpus on February 8, 1980. An en banc rehearing was allowed, and the panel affirmed the issuance of the writ on December 12, 1980.

On April 20, 1981, this honorable Court granted certiorari.

SUMMARY OF ARGUMENT

Who carries the burden of proof in a state criminal trial is a matter of federal due process of law. Within limits, a state may define what an "element" of a crime is, provided the state prove it beyond a reasonable doubt. A state may also provide for who shall bear the burden of persuasion of an affirmative defense.

Federal due process of law requires that the jury be correctly instructed as to the law of the case (especially as to the burden of proof) so it can properly perform its function of ascertaining the truth by applying the facts to the law given. If the law of the case is substantially changed retroactively, a new trial is necessary in order to have the truth-finding process remain intact and to maintain basic fairness and the integrity of the judicial process.

The *Wainwright v. Sykes*, 433 U.S. 72 (1977), cause/prejudice requirement does not bar respondent's review in habeas corpus of his claim the jury instructions given in his case violated federal due process of law. Respondent's case is controlled by *Hankerson v. North Carolina*, 432 U.S. 233 (1977). In both cases, the defendants failed to object to erroneous jury instructions at trial and both raised *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to the Supreme Court of the state. When *Hankerson* declared *Mullaney v. Wilbur* to be retroactive, *Isaac* was still on direct appeal to the state supreme court. Respondent is entitled to the benefit of a federal principle declared to be retroactive and no state procedural requirement can bar him its benefit.

Review of a retroactive change in the law is not controlled by cause/prejudice because deference to a contemporaneous objection requirement presupposes the existence of a legal principle that could be objected to.

If a retroactive decision is subject to *Wainwright v. Sykes* cause/prejudice, then respondent showed cause in that the

change in the law was not foreseeable, or if an objection had been made, it would have been a futile act under the law of the case and principle of *stare decisis*.

Respondent showed prejudice because the erroneous jury instruction went to the heart of the fact-finding process. The defendant was required to prove something when he, in fact, had to prove nothing.

Once a state declares a principle of law to be retroactive, how it applies the change is a matter of federal due process of law. Ohio arbitrarily applied its contemporaneous objection rule to deny respondent a new trial when it declared the law of self-defense to be in error, prejudicial and retroactive, but denied new trials to defendants who were found guilty by misinformed juries and granted new trials to defendants who were found guilty by misinformed judges for the sole reason Criminal Rule 30 applies to jury trials only. In both instances, the trier of fact applied the wrong law.

Certain errors so affect the fact-finding process that a new trial is necessary regardless of compliance with procedure. Plain error is a separate vehicle for review and is not subject to procedural bars. Failure of a state to recognize plain error in constitutionally protected areas when the error affected the outcome of the case, violates due process of law and entitles a defendant to federal habeas corpus relief.

ARGUMENT OF LINCOLN ISAAC

Question I:

DOES THE WAINWRIGHT v. SYKES, 433 U.S. 72 (1977), CAUSE/PREJUDICE REQUIREMENT BAR FEDERAL HABEAS CORPUS REVIEW OF THE DENIAL OF A NEW TRIAL BASED UPON A RETROACTIVE CHANGE IN THE LAW WHEN THE DEFENDANT FAILS TO OBJECT AT TRIAL?

A. Purpose of Ohio Criminal Rule 30

In Ohio the syllabus of the case is law and controls over the opinion of the court, unless *per curium*. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437. See also, *Hass v. State*, 103 Ohio St. 1 (1903)

On the same day Isaac's appeal was denied, the Supreme Court of Ohio decided *State v. Williams*, 51 Ohio St. 2d 112 (1977), vacated in part, *sub nom, Williams v. Ohio*, 439 U.S. 955.

Paragraph one of the syllabus states:

> An appelate court need not consider an error which the party complaining of the trail court's judgment could have called, but did not call, to the trial court's attention at a trial when such error could have been avoided or corrected by the trial court (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)

The court further stated in its opinion at page 117:

> . . . "Any other rule," this court stated in *State v. Driscoll* (1922), 106 Ohio St. 33, 138 NE 376, at 39, "would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error." See Ohio Criminal Rule 30.
>
> The fact that appelant raises a federal constitutional question does not change this court's conclusion. It is an established rule of long standing in this state that a criminal constitutional question can not be raised in the Supreme Court unless it is presented and urged in the court below . . .

Williams, at page 117, quotes *Driscoll* from page 38, which in turn quotes *State v. McCoy*, 88 Ohio st. at page 450 (1922). *Driscoll* further stated at page 39:

> It should be added that the error complained of is purely technical, that it could not have prejudiced the accused, and that a full instruction on that point would not have caused the jury to reach a different ver dict.

State v. McCoy states (quoted also in *Driscoll*):

> When the charge given is free from prejudicial error, but fails to cover all the questions involved in the case, such failure is not grounds for reversal unless it was called to the attention of the court and further instruction requested and refused, *provided the jury is not misled by the charge as given*. (emphasis added)

Ohio follows the principle of *stare decisis*. At the time of Isaac's trial on September 9, 1975, the cases of *Silvus v. State*, 22 Ohio St. 90 (1871), *State v. French*, 171 Ohio St. 501 (1961), and *State v. Seliskar*, 35 Ohio St. 2d 95 (1973), were controlling. The trial court would not have ruled differently even had the defendant objected. *Ames v. Consolidated Iron-Steel Mfg. Co.*, 9 Ohio L Abs. 52 (Cuyahoga Cty 1930), *Shoemaker v. City of Cincinnati*, 68 Ohio St. at page 612 (1903), *Tax Commissioner v. Castings Co.*, 111 Ohio St. at page 126 (1974), *Kearny v. Buttles*, 1 Ohio st. at page 367 (1853).

Therefore, Criminal Rule 30 *presupposes* the existence of a legal principle applicable to the proceedings. *Meyers v. State of Washington*, 646 F 2d at 360 (1981). The duty of trial counsel is not to make new law, but to diligently find existing law and provide it to the court so it has the opportunity to correctly charge the jury as to the law to be applied in the case.

Errors in jury instructions not brought to the court's attention that were technical and did not mislead the jury are waived. Errors that were not technical and did mislead the jury are not to be disregarded.

B. "Cause" Shown

Ohio, since *Silvus v. The State*, 22 Ohio St. 90 (1871), has adhered to the rule that the defendant had to prove self-defense by a preponderance of the evidence. The *Silvus* Court specifically rejected the contention that the state had to disprove self-defense and approved a presumption in a homicide case that the defendant had not acted in self-defense. See also, *State v. French*, 171 Ohio St. 501 (1961), *State v. Seliskar*, 35 Ohio St. 2d 95 (1973).

On January 1, 1974, Ohio adopted a new criminal code. Ohio Revised Code 2901.05(A) stated:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affimative defense is upon the accused.

Accompanying the new criminal code was a transition table that did not reflect a change in the prior law was intended. See Amended Substitute House Bill 511, Reverse Disposition Table. Committee notes following that section did not reveal any intended change. The author's notes included in Volume 4, *Ohio Jury Instructions*, Section 409.60, from which Isaac's charge was taken, did not reflect a change in the law was intended. Leading treatises perceived no change. 1 Anderson's *Ohio Criminal Practice and Procedure*, para 52.15 (1975 ed.), 1 O. Schroder and L. Katz, *Ohio Criminal Rule Practice*, title 29 at 14 (1974 ed.). Compare: *Baldwin's Ohio Criminal Practice Manual* (6th ed. 1969), text section para 23.5. No reported decision reflected a change. The appellate decision of *State v. Robinson*, 48 Ohio App. 2d 197, was not reported until after the Supreme Court decision in that case was reported. The unreported appellate decision was in conflict with *State v. Rogers*, 43 Ohio St. 2d 28 (July 2, 1975), decided two months before

Isaac's trial (and after *Mullaney* on June 9, 1975), wherein the Supreme Court of Ohio stated at pages 30-31:

> Inasmuch as self-defense is an affirmative defense, which must be established by a preponderance of the evidence (*State v. Seliskar* (1973), 35 Ohio St. 2d 95, 96 . . .)
>
> . . . the defense of using reasonable force to effect a citizen arrest . . . is . . . an affirmative defense (RC 2901.05 (C) (2)) which places the burden of going forward with the evidence upon the accused (RC 2901.05(A)) *to prove that issue by a preponderance of the evidence* . . . . (emphasis added)

It is a safe to state few attorneys or judges foresaw the dramatic change. As Isaac's trial counsel, this writer never considered such a change would occur. The law of self-defense in Ohio was carefully researched. Proposed jury instructions on when self-defense could be asserted, i.e., force v. force, and not only when in fear of death or great bodily harm, were submitted to the court but refused. This was *not* a case of perceiving a change in the law in deeming an objection to it to be futile. No attorney would want to prove his client acted in self-defense when, upon a simple request to the court, the state could be made to disprove that his client did not have such a right.

It is evident, or *stare decisis* grounds, that an objection, if made, would have been futile and as such would excuse failure to object. *Smith v. Estelle*, 602 F 2d at page 708, n. 19, and *Estelle v. Smith*, 49 U.S. L.W. at 4493, n. 12 (1981). In the case of *State v. Slone*, 45 Ohio App. 2d 24 (Franklin Cty 1975), trial counsel in Franklin County, Ohio, requested the trial judge to charge the jury the state had to disprove self-defense in accordance with the Franklin County unreported decision of *State v. Mathews*, No. 74-AP-428, and the trial judge refused to do so and read the standard instructions. *Mathews* was the basis for *Robinson* in 1976.

Petitioner's sole basis to defeat "cause", is to allege respondent's counsel could have, or should have, anticipated the change in the law; objected to the charge and forged the new law himself in order to reap its benefits. The state can not urge that *Mullaney v. Wilbur*, 421 U. S. 684 (1975), decided three months before Isaac's trial, somehow put respondent's counsel on notice that the Supreme Court of Ohio would dramatically change the law of affirmative defenses. *Mullaney was law one month before State v. Rogers* was decided.

Mullaney did not clearly speak to all affirmative defenses. *Leland v. Oregon*, k343 U.S. 790, was not overruled. The jury in Isaac was not charged with an improper presumption.

Counsel read *Mullaney* as this Court did in *Patterson v. New York*, 432 U.S. 197 (1977). Presumptions assisting proof of an element to be proven by the state are not permissable. Since *Patterson* expressly states *Mullaney* never stood for what petitioner wants it to stand for, Isaac can not be held to foresee a change in Ohio law based upon it.

The Supreme Court of Ohio refused to reach *Mullaney* rationale, but decided *Robinson* on state grounds. Therefore, only the enactment of Ohio revised Code 2901.05(A) would have, or should have, put counsel on notice of the impending *Robinson* change. As previously discussed, no state references noted any intended change.

Stating *Robinson* was foreseeable, places a higher burden of diligence on trial counsel than upon the highest Court of the State of Ohio, who also failed to perceive the change three months before Isaac's trial. Is trial counsel to be held to a standard of omnipotency?

The change was not foresseable and therefore, failure to object to the jury instructions that were in accord with the law of the case is excused. *Lee v. Missouri*, 439 U.S. 461 (1979), *Canary v. Bland*, 583 F 2d 887 (6th Cir. 1978), *U.S. v. Frady*,

636 F 2d 506 (D.C. 1980) at n. 17, *Meyers v. State of Washington*, 646 F 2d 355 (9th Cir. 1981), concurring opinion of Judge Locher, *State v. Humphries*, 51 Ohio St. 2d at page 110 (1977), *O'Connor v. State of Ohio*, 385 U.S. 92 (1966).

If failure to foresee a change in the law, and a second failure to foresee it would be held to be retroactive is not "cause", then there can never be a review of how a state applies its retroactive law.

C. Prejudice Shown

Isaac's entire defense was he was justified in his actions. Trial counsel hammered away at self-defense in opening, closing, and upon direct and cross examinations. Trial counsel attempted to show the victim was larger in physical size than defendant; that the altercation took place nearer the defendant's car than the victim's to show that the victim had to approach the defendant; that the defendant stopped hitting the victim when he felt the victim no longer was the aggressor, and finally, that there was only disputed evidence that the defendant threw the first punch.

The State of Ohio has recognized that for the period of time from January 1, 1974 through November 1, 1978, that if a jury was instructed that a defendant had the burden of proving an affirmative defense, that such jury instruction constitutes prejudicial error, and if objected to, the defendant is entitled to have the jury instructed that he had no such burden. *State v. Jones*, 67 Ohio St. 2d 244 (1981). Other courts have presumed prejudice under similar circumstances. *Meyers v. State of Washington*, 646 F 2d at 363 (1981), *Rachel v. Bordenkircher, 590 F 2d 200 (6th Cir. 1979)*.

D. Cause/Prejudice Not Applicable

The legal principle of retroactivity is not controlled by cause/prejudice. Deference to a procedural rule requiring ob-

jection presupposes an existing legal principle that could be objected to. The legal principle was not objectionable until after it was changed. If counsel must object "to preserve the record" hoping a change in the law may occur, and such change may be declared retroactive, then at trial counsel must object to *everything*. This disruption of the trial process can not be tolerated. See dissent in *Cole v. Stevenson*, 620 F 2d 1055, 1069 (4th Cir. 1980). It would require counsel to overload his appellate briefs with nonmeritorious issues, *Meyers v. State of Washington*, 646 F 2d at 360 (1981), which could dilute the effectiveness of his meritorious claims. *Cole v. Stevenson, supra*, n. 25 at 1071.

E. Wainwright v. Sykes in Perspective

The federal courts have the power in habeas corpus to review errors in state criminal trials that affect federal constitutional rights. Deference to state procedure is a matter of comity.

Fay v. Noia, 372 U.S. 391 (1963), was the test in effect at the time of defendant's trial on September 9, 1975. *Robinson* was decided July 21, 1976. *Wainwright v. Sykes* was decided June 23, 1977. Under *Fay v. Nois*, defendant would be entitled to review because failure to object was not an intentional bypass.

Petitioner claims the federal courts can not review an error even if the error is a violation of a constitutional right and it is found to be prejudicial, unless trial counsel objected. Petitioner places the entire burden of an error-free trial on trial counsel. The role of the trial judge to preside over an error-free trial is nullified. *State v. Gideons*, 52 Ohio App. 2d at page 78 (1977).

Adherence to petitioner's contention is not to give deference to state procedure, but is to become subservient to it. The federal courts no longer would be the final arbitrator of federal constitutional rights.

Before such deference is given, surely the federal courts can examine state procedure to insure it serves both a legitimate state

and federal interest. As discussed in Question IV, Ohio has permitted Criminal Rule 30 to emasculate Criminal Rule 52 to a point where Ohio seems to believe, so long as counsel did not object, the trial had to have been error-free.

Errors occur at trial for only three reasons — the trial counsel goofed, the judge did not catch him, or the law was retroactively changed.

It is not error for a defendant to relinguish a known right, *Fay v. Noia*, 372 U.S. 391 (1963), and such decision should not be reviewable.

When a defendant unknowingly relinquishes a right through the failure of his counsel to act, a more difficult question arises.

One can not reconcile failure to object with competent counsel. If respondent's counsel did not object to the charge, and he should have done so, he is incompetent and cause has been shown.

In order for "cause" to remain valid, this Court must find it does not include incompetent counsel. That is, the default of counsel is imputed to the client who can not complain. Finality becomes the polestar and not fairness.

If this court believes, as does respondent, that it is unfair to impute all acts of counsel to his client, especially when many times a defendant can not choose his counsel, then *Wainwright v. Sykes* must be reexamined.

State procedural rules do not assist in the fact-finding process. They merely expedite the process and add finality to it.

Errors in a trial are not recognized by federal law have always remained subject to a procedural bar for not raising them.

Deference to the states can be observed by requiring errors that do affect a federal constitutional right to be presented to the state courts first for their opportunity to pass on the claims.

Does this mean that the federal courts will then review all state decisions? If the state court refuses to pass on the federal

claim without a valid reason, yes. Adherence to a contemporaneous objection rule inspite of plain error would cause review.

The state should be required to realistically recognize and examine plain errors in light of *Chapman v. California*, 386 U.S. 18 (1967). In most instances, that will end the matter. *State, ex rel Corrigan v. White*, 46 Ohio St. 2d 29 (1976), *State v. Woolery*, 46 Ohio St. 2d 316 (1976), *State v. Lockett*, 49 Ohio st. 2d 48 (1976), *State v. Weind*, 50 Ohio St. 2d 24 (1977), *State v. Black*, 54 Ohio St. 2d 304 (1978), *State v. Faulkner*, 56 Ohio St. 2d 42 (1978), *State v. Clayton*, 62 Ohio st. 2d 45 (1980), *State v. Adams*, 62 Ohio St. 2d 151 (1980).

Many defendants want only their day in court. An adverse decision based on sound judicial reasoning in generally not appealed.

Question II:

ONCE THE SUPREME COURT OF THE UNITED STATES DECLARES A PRINCIPLE OF CRIMINAL LAW TO BE RETROACTIVE, CAN A STATE REFUSE A DEFENDANT A NEW TRIAL BASE UPON A STATE PROCEDURAL RULE?

A. Hankerson v. North Carolina is Controlling

Burden of proof in a state criminal case is a matter of federal due process of law. *In re Winship*, 397 U.S. 358 (1970). There are limits beyond which the states cannot go. *Patterson v. New York*, 432 U.S. 197 (1977), *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Through the supremacy clause of the United States Constitution, a decision of the Supreme Court of the United States binds the states. Therefore,a decision by the Supreme Court of the United States that a federal constitutional right is to be given

retroactive application cannot be defeated by state procedural rule.

Retroactive is not constitutionally required. A change in the law may be declared: (1) prospective only (even the person who raised the issue and won does not get its benefits), (2) partially retroactive (applies to cases still on review or relates back to a specified time), or (3) fully retroactive (all who can show on the record that the ruling applies to them receive the benefit of the change, i.e., a new trial). *Linkletter v. Walker*, 381 U.S. 618 (1965).

Hankerson v. North Carolina, 432 U.S. 233 (1977), declared *Mullaney v. Wilbur* to be retroactive to at least cases pending on appeal. Petitioner Hankerson got a new trial. The facts on *Hankerson* control the facts of *Isaac*.

Johnny Hankerson raised the issue of self-defense at trial. The jury was told he had to satisfy them he was justified in using force. Lincoln Isaac raised the issue of self-defense at trial. The jury was told he had to prove, by a preponderance of the evidence, that he was justified in using force. Neither defendant objected at trial to the instructions.

Hankerson, for the first time, objected to the instructions on direct appeal to the Supreme Court of North Carolina based upon *Mullaney* reasoning. Isaac raised the *Robinson* issue in the Fourth District Court of Appeals for Pickaway County, Ohio, and also raised the *Mullaney* issue to the Supreme Court of Ohio. The Supreme Court of North Carolina considered the validity of the instructions, but refused to apply *Mullaney* retroactively. The Supreme Court of Ohio considered the validity of the instructions in *Humphries* and found the change to be retroactive, but denied Isaac's motion to certify the record for want of a substantial constitutional question. This court reversed and Johnny Hankerson got a new trial.

Footnote 8 in *Hankerson v. North Carolina*, 432 U.S. 233 at page (1977), has caused great confusion. Did the majority opinion intend to declare *Mullaney* fully retroactive and then take away the benefit of the change by allowing a state procedural contemporaneous objection rule to bar retrial? If so, then the retroactive language is illusory. If so, the Court has permitted the question of retrial to hinge solely upon whether or not the several states had a procedural bar.

The disharmony of the opinions of the Justices of this Court in regard to whom a retroactive decision should benefit, should not bar Lincoln Isaac to benefit of the retroactivity declared in *Hankerson*.

As a matter of federal constitutional law, Hankerson's jury was misinstructed. Therefore, as a matter of federal constitutional law, Isaac's jury was also misinstructed. The fact the Supreme Court of Ohio refused to reach the constitutional grounds raised by Isaac, does not mean his federal rights were not violated. *Hankerson* was decided June 17, 1977. Isaac's constitutional question was dismissed July 29, 1977. The Supreme Court of Ohio knew *Mullaney v. Wilbur* was retroactive when it dismissed Isaac's appeal. It knew Johnny Hankerson got a new trial, and it knew at least the cases pending on appeal were to be benefited.

B. Retroactivity and Habeas Corpus

One cannot deny to Isaac the benefit of *Hankerson* because he chose collateral review through habeas corpus as opposed to direct review to this Court. Many times cost, proximity to the District Court, convenience of counsel, and a required review dictate habeas corpus as a better procedure. If direct appeal is required, then this Court's docket will be tolerably overburdened.

Distinguishing between collateral and direct review as a test for who obtains the benefits of retroactivity should not be adopted. Before declaring a principle of law fully retroactive, the Court will consider its impact on justice. If declared to be fully retroactive, the benefit applies to all defendants who can prove they raised the issue in their trial record and it was material. It makes no difference when their decisions became "final".

If a decision is declared to be partially retroactive, then the benefits of retroactivity must be allowed to at least the one who argued and won the point as a reward for his diligence. One must assume that the law that was changed in the interest of society improved it and such an incentive is desirable. All others who raised the point in the deciding court, but were not chosen as a vehicle for decision, and all others who raised the issue in any lower courts which were still pending for review, must also benefit. They too have been diligent, and nonjudicial factors played a part on who got to be the reported case, i.e., time to prepare the transcript, the time it took to decide the issue and the arbitrary choice of which case was chosen for decision.

It should make no difference in which court the issue was raised, so long as that issue was pending within the system at the time the law was declared retroactive. This could be in the trial, appellate or Supreme Court of the state, or in the Federal District Court or Federal Appellate Court in habeas corpus, or on direct appeal to the Supreme Court of the United States.

If a defendant failed to grasp, as applicable to his case, the change in the law not yet declared to be retroactive, and he failed to raise it in his pending appeal or by filing a writ of habeas corpus, then he is barred from obtaining relief because of his nonaction. Therefore, cases in which a defendant has been paroled, in all probability, would not be affected. The interests of finality have been addressed since only those defen-

dants who raised the issue of retroactivity after the decision that changed the law would benefit. *Lee v. Missouri*, 439 U.S. 461 (1979). The distinction is drawn as a result of a defendant's diligence and he can not complain.

If *Hankerson* states only cases on direct review are to be given the benefit of the retroactive change, then Isaac should also benefit since he was on direct review to the Supreme Court of Ohio when they announced its decision in *Humphries*, which was after *Hankerson*.

Question III:

ONCE THE HIGHEST COURT OF THE STATE, IN ITS SYLLABUS, DECLARES A CHANGE OF LAW TO BE RETROACTIVE, CAN IT SELECTIVELY ENFORCE A PROCEDURAL "CONTEMPORANEOUS OBJECTION" RULE TO BAR A NEW TRIAL WHEN A DEFENDANT'S TRIAL RECORD DEMONSTRATES A CHANGE IN THE LAW WOULD MATERIALLY AFFECT ITS OUTCOME?

A. Ohio's State Law of Retroactivity

The State of Ohio, in the case of *State v Robinson*, 47 Ohio St. 2d 103 (1976), was careful to couch its decision on state interpretation of a state statute. Thus, the Ohio Supreme Court attempted to avoid the mandate set forth in *Hankerson v. North Carolina*, 432 U.S. 233 (1977).

However, a close examination of the law of Ohio reveals that in doing so, Ohio violated its own declared principles of retroactivity. It selectively enforced its retroactive decision, and it did not equally treat defendants under the same set of facts.

The effect in Ohio of overrulling a former decision was stated in the case of *P. Electric Co. v. Bowers*, 164 Ohio St. 209 (1955):

> The general rule is that a decision of the Court of supreme jurisdiction overruling a former decision is retrospective in its operation and the effect is not that the former law was bad, but that it never was the law.

Ohio is careful to state that the application of a new rule of law to a case pending on appeal is not to be considered retrospective application. *State v. Lynn*, 5 Ohio St. 2d 106 (1966). Ohio appears to adopt the proposition that cases pending on appeal, when a change of law is announced, are entitled to the benefits of the change in the law. *LaBarbera v. Batch*, 5 Ohio App. 2d 151 (Cuyahoga Cty. 1966).

The case of *Pinch v. Maxwell, Warden*, 3 Ohio St. 2d 212 (1965), defines retrospective application as follows:

> The retrospective application of a newly declared ruling, we mean . . .the application of the ruling to conviction, which had become final, i.e., where the subject of conviction has been rendered, the assessability of appeal exhausted, the time for petition for certiorari to the United States Supreme Court has elapsed before the first declaration of such newly declared ruling.

Clearly, respondent Isaac had raised the issue to apply *Robinson* retroactively to his case, not only in the appellate court immediately upon its being published, but also in the Supreme Court of Ohio. Therefore the Supreme Court of Ohio could not claim Isaac's case was "final" before its decision. Of course, *Robinson* was expressly determined to be retroactive to all cases tried after January 1, 1974. The Ohio Supreme Court correctly found that *Robinson* had to be retrospective until that date under the test it set forth in *State v. Carter*, 60 Ohio St. 2d 34 (1979).

Counsel for Isaac can find only one case where the State of Ohio was faced with applying its own state law retroactively. In the case of *State v. Evans*, 33 Ohio St. 2d 185 (1972), two cases

were pending before the Supreme Court of Ohio. Both the defendants raised to the Supreme Court the issue of whether or not the admission into evidence of their mug shots constituted reversable error. In one trial, one defendant objected to the introduction of his mug shot, and the other defendant failed to object. The Supreme Court of Ohio announced its decision in *State v. Bredlove*, 26 Ohio St. 2d 178 (1971), announcing when and how mug shots were admissible into evidence. Citing *State v. Lynn*, 5 Ohio St. 2d 106, with approval, the Court found the change in law applied to cases pending on appeal, but reversed the conviction of only the defendant who objected. The Court affirmed the conviction of the defendant who failed to object to the admission into evidence of his mug at trial by distinguishing *O'Connor v. Ohio*, 385 U.S. 92 (1966), stating that a federal constitutional right was not involved in this case, and therefore, defendant's failure to object procedurally barred the benefit of the decision to him. Here, Isaac's failure to object involved a federal constitutional right.

The Supreme Court of Ohio further held that when counsel could not foresee a change in the law, then his failure to object would not be a bar to review. In the case of *State v. Collins*, 10 Ohio St. 2d 92 (1967), the Supreme Court of Ohio found it could not hold the defendant to foresee *Meissiah v. U.S.*, 377 U.S. 201, since the Ohio Supreme Court held after that decision that the mandate of that decision was inapplicable. That case should control *Isaac* since the Supreme Court of Ohio, *in dicta*, stated three months before Isaac's trial, but after *Mullaney*, that the burden of proof was on the defendant to prove self-defense. If the State of Ohio misled counsel in *Collins* and allowed review, then the State of Ohio also misled counsel in *Isaac* and it should not have barred review.

B. Ohio's Selective Enforcement of Its Retroactive Decision

State v. Humphries, 51 Ohio St. 2d 95, declared *State v. Robinson*, 47 Ohio St. 2d 103, to be retroactive to January 1, 1974. Mr Humphries, at a jury trial, claimed insanity, and the jury was instructed that he had the burden to prove, by a preponderance of the evidence, that he was insane. Ms. Myer, a case consolidated with *State v. Humphries*, went to a court trial alleging insanity. The Supreme Court of Ohio, when it declared *Robinson* retroactive, denied Mr. Humphries a new trial because Criminal Rule 30 required him to object to the jury instructions. However, it granted to Ms. Myer a new trial because Criminal Rule 30 affected only jury trials. Ms. Myer simply did not have to object to the law the judge was considering. In both instances, the triers of fact, i.e., the jury and the judge, were misinformed as to the law to be applied to the case. Both the judge and the jury at the time believed both defendants had to prove, by a preponderance of the evidence, that they were insane. Since the trier of fact was misinformed as to law in both cases, Criminal Rule 30 cannot be rationally related to ascertaining the truth. Only the defendant who exercised his constitutional right to a jury trial was denied a new trial. The defendant who did not want to be exposed to the jury and chose trial by the court was granted a new trial. Two defendants raised identical defenses. Two defendants failed to object. Two triers of fact were misinformed. One defendant received a new trial and one defendant did not. The only distinction is one was tried by a jury and one was tried by the court. Such a distinction cannot stand.

Further, the court held, despite Ms. Myer's failure to object, she properly preserved the record by assigning as error the placement of the burden of proof of insanity. Isaac did likewise, but was not found to have preserved the record.

Question IV:

IT IS A VIOLATION OF DUE PROCESS OF LAW FOR THE HIGHEST COURT OF A STATE NOT TO FIND "PLAIN ERROR" AND TO REFUSE TO ORDER A NEW TRIAL TO CASES PENDING ON REVIEW WHEN THE COURT CHANGES THE LAW A CONSTITUTIONALLY PROTECTED AREA AND DECLARES THE CHANGE TO BE RETROACTIVE?

A. Ohio's Treatment of Plain Error

Isaac raised, in the Supreme Court of Ohio, the issue of plain error pursuant to Criminal Rule 52(b). He further raised the issue of *O'Connor v. Ohio*, 385 U.S. 92 (1966), that his failure to object did not bar his review. The Supreme Court of Ohio, in *State v. Long*, 53 Ohio St. 2d 91 (1978), held that plain error will not lie upon a set of facts so blatant that it appears that plain error will not exist in self-defense cases. Contrary to the intended result, Ohio has permitted Criminal Rule 30 to destroy the effect of Criminal Rule 52(b). *State v. Gideons*, 52 Ohio App. at page 77 (1977). A close review of Ohio law reveals that the Supreme Court of Ohio has *never* granted a reversal based upon the doctrine of plain error. In fact, where the lower courts have found plain error, the Supreme Court has reversed to deny a defendant a new trial. *State v. Durkin*, 66 Ohio St. 2d 158 (1981), *State v. Clayton*, 62 Ohio St. 2d 45 (1980).

The doctrine of plain error is separate and apart from Criminal Rule 30. It recognizes that in certain instances a criminal trial can be so unfair to a defendant that he should be entitled to a new trial, regardless of whether or not his attorney failed to object, or some other procedural bar occurred.

When Ohio declared *Robinson* to be retroactive in the case of *Humphries*, it necessarily found that the trials occurring after January 1, 1974, were improper where the jury was instructed

the defendant had the burden to prove an affirmative defense. The Supreme Court has found such instructions to be prejudicial requiring new trials. However, the Court has continued to adhere to its decision that plain error did not occur in any of those trials.

Counsel for respondent cannot think of a more devastating error than when a jury is misinstructed as to the burden of proof. A defendant is entitled, as a matter of federal due process of law, to have the jury properly instructed as to the law of the case. If the law of the case is changed retroactively, defendant is entitled to a retrial upon the new law. Not to allow a retrial is to incarcerate a defendant under a faulty finding of guilty. *State v. Gideons*, 52 Ohio App. at page 78 (1977), succinctly states respondent's position:

> To properly decide a criminal case, it is essential that the jury has a clear understanding of which party has the burden of proof. Without such an understanding, the jury can not possibly properly perform its function. When in a criminal case the trial court erroneously places the burden of proof on the defendant, that error effects substantial rights of the accused and effects the basic fairness, integrity and public reputation of the judicial process. Such an error is plain error under Criminal Rule 52(b) and may be reviewed by an appellate court where the accused failed to object to the jury instructions as required in Criminal Rule 30.

Henderson v. Kibbe, 431 U.S. 145 (1977), recognizes, "an omission or incomplete instruction is less likely to be prejudicial than a misstatement of the law." See also, *Berrier v. Egeler*, 583 F 2d 515 (6th Cir. 1978), *U.S. v. Frady*, 636 F 2d 506 (D.C. 1980).

The Fourth District Court of Appeals for Pickaway County, Ohio, the same court that denied Isaac the benefit of *Robinson* under Criminal Rule 30, later found plain error to exist in *State*

v. Burke (unreported), see appendix. Burke was charged with Carrying a Concealed Weapon and the jury was charged that he had to prove the defense that he was afraid he would be robbed because he carried large sums of money. The Appellate Court reversed finding plain error. Are not all affirmative defenses to be treated the same?

B. Plain Error as a Separate Remedy

Criminal Rule 30 can not be permitted to emasculate Criminal Rule 52, as Ohio attempted to do in *O'Connor v. Ohio*, 385 U.S. 92 (1966). It is difficult to believe that no error ever occurred in Ohio that was so serious a new trial was never warranted. Criminal Rule 30 brings finality to the system. Criminal Rule 5 brings justice.

Since Ohio provides for review under Criminal Rule 52 without regard to Rule 30, federal courts can review under this standard, without regard to *Wainwright v. Sykes. Harlin v. Missouri*, 439 U.S. 459 (1979), *Hockenbury v. Sowders*, 633 F 2d 433 (6th Cir. 1980), *Berrier v. Egeler*, 583 F 2d 515 (6th Cir. 1978), cert. denied, 429 U.S. 955 (1978), *Rachel v. Bordenkircher*, 590 F 2d 200 (6th Cir. 1978), *Cook v. Bordenkircher*, 602 F 2d 117 (6th Cir. 1979), cert denied, 444 U.S. 936 (1979), *Krzeminski v. Perini*, 614 F 2d 121 (6th Cir. 1980).

CONCLUSION

Lincoln Isaac is entitled to his writ of habeas corpus on principles of federal retroactivity. He is entitled to his writ because the State of Ohio violated federal due process of law in the manner in which it arbitrarily selected who would benefit under state retroactive principles. He is entitled to his writ because the State of Ohio, through Criminal Rule 30, has emasculated any review of federal constitutional rights under

plain error, Criminal Rule 52, in violation of federal due process of law. Cause/prejudice is not applicable to bar federal review in habeas corpus and even if it were, both have been shown.

The decision of the en banc panel should be affirmed.

Respectfully submitted,

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